

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DONTE McCLELLON,

Plaintiff,

v.

CAPITAL ONE BANK, N.A.,

Defendant.

CASE NO. C18-0909-JCC

ORDER

This matter comes before the Court on Defendant's motion to dismiss (Dkt. No. 12) Plaintiff's amended complaint (Dkt. No. 11). Having thoroughly considered the parties' briefing and the relevant record, the Court finds oral argument unnecessary and hereby GRANTS Defendant's motion (Dkt. No. 12) for the reasons explained herein.

I. BACKGROUND

Plaintiff Donte McClellon ("McClellon"), proceeding *pro se*, alleges that Defendant Capital One Bank, N.A., ("Capital One"), is liable to him for a series of allegedly fraudulent transactions in his checking account made between November 2017 and January 2018.¹ (Dkt.

¹ This is one of six related lawsuits filed by McClellon against various financial institutions, four of which are still pending before the Court. *See McClellon v. OptionsHouse*, Case No. C18-0817-JCC, Dkt. No. 1-1 (W.D. Wash. June 5, 2018); *McClellon v. Bank of America, N.A.*, Case No. C18-0829-JCC, Dkt. No. 1-1 (W.D. Wash. June 7, 2018); *McClellon v. Wells Fargo Advisors Financial Network, et al.*, Case No. C18-0852-JCC, Dkt. No. 1-1 (W.D.

1 No. 11 at 2.) McClellon originally filed his complaint in King County Superior Court, but
2 Capital One removed the case to this Court.² (Dkt. No. 1.) In his three-page complaint,
3 McClellon made the following allegations against Capital One:

4 This is an action under the Uniform Commercial Code (4.22.005 to 925) and
5 Washington Consumer Protection Act, RCW 19.86.020, based upon Defendant's
6 blatant self-dealing and other intentional negligent misconduct in conversion,
7 freezing, pooling, otherwise manipulating Plaintiff's funds without Plaintiff's
8 authorization.

9 Plaintiff further allege that the Defendant breached the contract, failed to comply
10 with Regulation E and committed the tort of negligence in the handling of
11 Plaintiff's funds. The Plaintiff seeks compensatory damages and all other damages
12 (i.e., direct and consequential damages) allowed by law, and payment of costs and
13 attorneys' fees.

14 On or about September 30th 2017, Plaintiff opened a checking account with
15 Defendant . . . Plaintiff timely filed his good faith Regulation E claims with
16 Defendant but the Defendant failed to protect the checking account in subject,
17 provisional credit the Plaintiff and have those funds be accessible to him.

18 The fraudulent transactions at issue that took place in the checking account in
19 subject are \$3,300 at Bank of America, \$1,752.86 at W FT Lauderdale respectively
20 posted on January 22nd, 2018. And another series of fraudulent transactions from
21 SQC Square Cash for \$400, \$250, \$100, \$400 posted on January 16th, 2018. And
22 other fraudulent SQC transactions: \$100 (January 26th, 2018), \$200 (28th, 2018),
23 \$125 (January 29th, 2018), and \$125 (January 29th, 2018), \$400 (December 31st,
24 2017), \$300 (December 28th, 2017), \$100 (December 28th, 2017), \$466 (December
25 3rd, 2017), \$63 (November 16th, 2017), and \$32 (November 2nd,
26 2017) . . . Regulation E states that a provisional credit must be provided within 10
business days.³

(Dkt. No. 1-1 at 1–2.) Capital One filed a motion to dismiss the complaint for failure to state a
claim upon which relief can be granted. (Dkt. No. 7.) The Court granted Capital One's motion
and dismissed McClellon's complaint without prejudice and with leave to amend. (Dkt. No. 10.)

Wash. June 12, 2018); *McClellon v. Citigroup Global Markets Inc.*, Case No. C18-0978-JCC,
Dkt. No. 1-1 (W.D. Wash. July 2, 2018).

² The Court denied McClellon's motion to remand. (Dkt. No. 10.)

³ All of the allegations quoted in this order are taken verbatim from the complaint (Dkt.
No. 1-1) and amended complaint (Dkt. No. 11).

1 The Court noted that, “McClellon’s claims are conclusory, in that they lack specific facts to
2 show Capital One was responsible for, or involved with, the alleged fraudulent transactions.” (*Id.*
3 at 3.) The Court also stated that the complaint failed to provide sufficient information to
4 determine how Capital One violated Regulation E. (*Id.* at 4.)

5 McClellon timely filed an amended complaint. (Dkt. No. 11.) The amended complaint
6 contains all of the allegations made in the original complaint. (*Compare* Dkt. No. 1-1, *with* Dkt.
7 No. 11.) In addition, the amended complaint provides various factual allegations for why Capital
8 One is allegedly liable to McClellon under Regulation E. (Dkt. No. 11 at 2–4.) The amended
9 complaint contains a summary of Regulation E’s protections for depositors who report an error
10 in their account, such as McClellon. (*Id.*) The amended complaint cites to “Section 205.11”
11 which purportedly “states that if a consumer notifies an institution that an error involving an EFT
12 has occurred, the institution must investigate and resolve the claim within specified deadlines.
13 Errors covered by this requirement include unauthorized EFTs, incorrect EFTs, and the omission
14 from an account statement of an EFT that should have been included.” (*Id.* at 3.)

15 McClellon alleges that he “notified the Defendant within the 60 day time frame of these
16 transactions pursuant to Regulation E. Plaintiff timely notified that his card was lost/or stolen
17 directly to Defendant Bank as soon as he became aware of it.” (*Id.* at 4.) McClellon notes that
18 Capital One had “honored and paid prior fraud claims as well as identified errors in the checking
19 account in subject, however Defendant whatever reason is now backpedaling and refusing to
20 honor similar fraud claims identified in this suit.” (*Id.*) The amended complaint asserts that by
21 “paying other fraud claims,” Capital One was aware of the fraudulent transactions occurring in
22 McClellon’s checking account. (*Id.*)

23 McClellon asserts that Capital One’s advertising regarding fraud protection was
24 misleading because his checking account experienced fraudulent transactions. (*Id.*) The amended
25 complaint also states that Capital One “engaged in blatant self-dealing because Plaintiff is the
26 depositor and Defendant makes money through its loans program off of Plaintiff’s deposits.” (*Id.*

1 at 5.)

2 Capital One filed a motion to dismiss the amended complaint pursuant to Federal Rule of
3 Civil Procedure 12(b)(6). (Dkt. No. 12.) Capital One asserts that the amended complaint suffers
4 from the same deficiencies that the Court identified in its order dismissing McClellon's original
5 complaint. (*Id.* at 1.) McClellon's response to Capital One's motion reads in its entirety:

6 Pro Se Plaintiff Donte McClellon hereby submits his opposition to Defendant's
7 motion to dismiss and respectfully request that the court deny Defendant's motion
8 to dismiss because Plaintiff has amended his complaint twice and provided proper
9 service of his original complaint to Defendant. In addition to that, Plaintiff denies
10 Defendant's erroneous statement that 'Plaintiff is abusing the legal process to try
11 to extort nuisance settlements.' Furthermore, Defendant highlighted that '[t]he
12 futility of permitting another amendment is' inappropriate here, however Plaintiff
13 is pro se and isn't an attorney nor trying to be one. Sticking to the facts is what
14 Plaintiff wants to focus on in every individual case. Plaintiff believes that he had
15 added enough facts and law to satisfy the court in this specific case and if court still
16 believes that Plaintiff hasn't include enough facts then offering another chance to
17 amend complaint would be fair.

18 (Dkt. No. 13.) McClellon contemporaneously filed a second amended complaint, without
19 seeking leave of Court. (Dkt. No. 14.)

20 A party may amend a pleading once, as a matter of course, but "[i]n all other cases, a
21 party may amend its pleading only with the opposing party's written consent or the Court's
22 leave." Fed. R. Civ. P. 15(a)(1), (2). McClellon was not entitled to file a second amended
23 complaint as a matter of course because he already amended his complaint. (*See* Dkt. No. 11.)
24 Nor did McClellon receive written consent from Capital One or leave from the Court to file a
25 second amended complaint. (*See* Dkt. No. 16.) Therefore, the Court STRIKES McClellon's
26 second amended complaint (Dkt. No. 14) and will not consider its allegations in deciding
Defendant's motion to dismiss.

23 **II. DISCUSSION**

24 **A. Legal Standard for Motion to Dismiss**

25 A defendant may move for dismissal when a plaintiff "fails to state a claim upon which
26 relief can be granted." Fed. R. Civ. P. 12(b)(6). To survive a motion to dismiss, a complaint must

1 contain sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its
2 face. *Ashcroft v. Iqbal*, 556 U.S. 662, 677–78 (2009). A claim has facial plausibility when the
3 plaintiff pleads factual content that allows the Court to draw the reasonable inference that the
4 defendant is liable for the misconduct alleged. *Id.* at 678. “[T]he pleading standard Rule 8
5 announces does not require ‘detailed factual allegations,’ but it demands more than an
6 unadorned, the-defendant-unlawfully-harmed-me accusation.” *Id.* (citation omitted). The Court
7 holds *pro se* plaintiffs to less stringent pleading standards than represented plaintiffs, and
8 liberally construes a *pro se* complaint in the light most favorable to the plaintiff. *Hebbe v. Pliler*,
9 627 F.3d 338, 342 (9th Cir. 2010).

10 **B. McClellon’s Claims**

11 McClellon asserts the following causes of action against Capital One: (1) violation of
12 Regulation E; (2) violation of the Uniform Commercial Code (“UCC”); (3) violation of the
13 Washington Consumer Protection Act, Revised Code of Washington section 19.86.20 (“CPA”);
14 (4) breach of contract; and (5) negligence. (Dkt. No. 11 at 1.)

15 1. Regulation E Claim

16 The implementing regulations of the Electronic Fund Transfer Act (“EFTA”), 15 U.S.C.
17 § 1693, *et seq.*, commonly known as “Regulation E,” broadly deal with the “basic rights,
18 liabilities, and responsibilities of consumers who use electronic fund transfer and financial
19 institutions that offer these services.” 12 C.F.R. § 205.1. The EFTA and Regulation E establish
20 procedures that banks must follow in resolving transfer-related errors that are reported by
21 consumers. *See* 15 U.S.C. § 1693f; 12 C.F.R. § 205.11. Under the EFTA, “any person who fails
22 to comply with any provision of this subchapter with respect to any consumer, except for an
23 error resolved in accordance with section 1693f of this title, is liable to such consumer.” 15
24 U.S.C. § 1693m(a). A transfer “error” includes an unauthorized or incorrect electronic fund
25 transfer from the consumer’s account. *See* 15 U.S.C. § 1693f(f)(1)–(2); 12 C.F.R.
26 § 205.11(a)(1)–(2).

1 Within 60 days of a transfer error being reflected in a consumer's account statement, the
2 consumer must provide the financial institution with either oral or written notification of the
3 error. 12 C.F.R. § 205.11(b)(1). The notice must "[e]nable[] the institution to identify the
4 consumer's name and account number; and . . . indicate[] why the consumer believes an error
5 exists and include[] to the extent possible the type, date, and amount of the error, except for
6 requests described in paragraph (a)(1)(vii) of this section." 12 C.F.R. § 205.11(b)(1)(ii)–(iii).

7 Upon receiving such notice, a financial institution:

8 Shall investigate promptly and . . . shall determine whether an error occurred within
9 10 business days of receiving a notice of error. The institution shall report the
10 results to the consumer within three business days after completing its
11 investigation. The institution shall correct the error within one business day after
12 determining that an error occurred.

13 12 C.F.R. § 205.11(c)(1). A financial institution may also take up to 45 days to conduct its error
14 investigation, provided that it "[p]rovisionally credits the consumer's account in the amount of
15 the alleged error (including interest where applicable) within 10 business days of receiving the
16 error notice." 12 C.F.R. § 205.11(c)(2)(A).

17 McClellon seems to allege that Capital One violated Regulation E by failing to
18 provisionally credit his checking account after he informed it of the allegedly fraudulent
19 transactions.⁴ (*See generally* Dkt. No. 11.) The amended complaint does not contain sufficient
20 facts to support McClellon's Regulation E claim. Contrary to McClellon's assertions, a bank is
21 required to provisionally credit a consumer's account only if it is unable to complete its error
22 investigation within 10 days. *See* 12 C.F.R. § 205.11(c)(2)(A). Simply providing notice of a
23 transfer error, as McClellon allegedly did, did not necessarily obligate Capital One to
24 provisionally credit his account, but only to conduct a timely investigation and correct the

25 ⁴ The Court liberally construes McClellon's claim, as the amended complaint is not
26 entirely clear about which provision of Regulation E McClellon seeks to enforce. Based on the
allegations in the amended complaint, McClellon's claim appears to be brought pursuant to 15
U.S.C. § 1693m, for violations of the regulations dealing with transfer errors. *See* 12 C.F.R.
§ 205.11.

1 alleged error.

2 The amended complaint does not contain any allegations about whether Capital One
3 conducted a timely investigation into the reported errors. (*See generally* Dkt. No. 11.) Nor does
4 McClellon assert that Capital One failed to correct the alleged errors within the timelines
5 outlined in Regulation E. (*Id.*) In other words, the amended complaint fails to allege facts
6 demonstrating that Capital One was obligated to provisionally credit McClellon's account. While
7 McClellon asserts that Capital One had "honored and paid prior fraud claims," the bank's past
8 conduct does not require it to provisionally credit McClellon's under Regulation E. (Dkt. No. 11
9 at 3.)

10 For those reasons, the Court DISMISSES McClellon's Regulation E claim without
11 prejudice and with leave to amend. Dismissal without prejudice is appropriate because
12 McClellon could potentially cure his claim by alleging additional facts demonstrating that
13 Capital One is liable to him under the EFTA and Regulation E.

14 2. UCC Claim

15 The amended complaint makes a single reference to McClellon's UCC claim. (Dkt. No.
16 11 at 1) ("This is an action under the Uniform Commercial Code (4.22.005 to 925).").
17 Washington has adopted Article 4A of the UCC ("Article 4A"), which deals with fund transfers
18 from financial institutions such as banks. *See* Wash. Rev. Code 62A.4A. Article 4A regulates
19 funds transfers from a customer's bank to third parties. *See* Wash. Rev. Code § 62A.4A-104
20 UCC Comment 1 ("Article 4A governs a method of payment in which the person making
21 payment (the 'originator') directly transmits an instruction to a bank either to make payment to
22 the person receiving payment (the 'beneficiary') or to instruct some other bank to make payment
23 to the beneficiary."). Funds transfers are commonly known as "wire transfers." *See* Wash. Rev.
24 Code § 62A.4A-102 UCC Comment ("Article 4A governs a specialized method of payment
25 referred to in the Article as a funds transfer but also commonly referred to in the commercial
26 community as a wholesale wire transfer.").

1 The amended complaint alleges that the fraudulent transactions at issue occurred in
2 McClellon's checking account and were made from various sources, such as the mobile payment
3 system Square Cash. (Dkt. No. 11 at 2.) Based on the allegations in the amended complaint, the
4 transactions at issue were not the type of wire transfers that are governed by Article 4A.
5 Therefore, McClellon's UCC claim is DISMISSED with prejudice and without leave to amend.
6 A dismissal with prejudice is appropriate because further amendment would be futile. *See*
7 *Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1041 (9th Cir. 2011).

8 3. CPA Claim

9 McClellon asserts a claim under the CPA "based upon Defendant's blatant self-dealing
10 and other intentional negligent misconduct in conversion, freezing, pooling, otherwise
11 manipulating Plaintiff's funds without Plaintiff's authorization." (Dkt. No. 11 at 1.) To plead a
12 plausible CPA claim, a plaintiff must allege facts that satisfy the following elements: "(1) unfair
13 or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4)
14 injury to plaintiff in his or her business or property; (5) causation." *Hangman Ridge Training*
15 *Stables v. Safeco Title Ins. Co.*, 719 P.2d 531, 533 (Wash. 1986).

16 The amended complaint does not contain sufficient facts to create a reasonable inference
17 that Capital One committed an unfair or deceptive act or practice. "A [CPA] claim may be based
18 on a per se violation of a statute or on unfair or deceptive practices unregulated by statute but
19 involving the public interest." *Blake v. Fed. Way Cycle Ctr.*, 698 P.2d 578, 581–82 (Wash. Ct.
20 App. 1985). "A per se unfair trade practice exists when a statute that has been declared by the
21 legislature to constitute an unfair or deceptive act in trade or commerce has been violated."
22 *Merriman v. Am. Guarantee & Liab. Ins. Co.*, 396 P.3d 351, 367 (Wash. Ct. App. 2017). The
23 amended complaint does not allege that Capital One violated a statute that may serve as the basis
24 for a *per se* CPA violation.

25 Where an unfair or deceptive act or practice is not based on a statutory violation, a
26 plaintiff must show that "the alleged act had the capacity to deceive a substantial portion of the

1 public.” *Hangman Ridge*, 719 P.2d at 535. An alleged deceptive act or practice does not meet
2 this requirement if it is “unique to the relationship between plaintiff and defendant.” *Behnke v.*
3 *Ahrens*, 294 P.3d 729, 736 (Wash. Ct. App. 2012). Thus, “[t]o establish an unfair or deceptive
4 act, there must be shown a real and substantial potential for repetition, as opposed to a
5 hypothetical possibility of an isolated unfair or deceptive act's being repeated.” *Id.* at 737.

6 McClellon has not alleged facts establishing that Capital One’s conduct had the capacity
7 to deceive a substantial portion of the public. First, McClellon has not asserted facts that suggest
8 Capital One acted deceptively in allowing the allegedly fraudulent transfers.⁵ Second, the
9 amended complaint does not contain sufficient facts to demonstrate that the alleged unfair act or
10 practice—Capital One’s failure to prevent fraudulent transactions—has a real and substantial
11 potential to be repeated. *Id.* In other words, McClellon’s claims against Capital One are specific
12 to him, and do not amount to the type of deceptive or unfair practices that have the potential to
13 deceive the public at large.

14 For the foregoing reasons, McClellon’s CPA claim is DISMISSED with prejudice. A
15 dismissal with prejudice is appropriate because further amendment would be futile. *See*
16 *Cervantes*, 656 F.3d at 1041.

17 4. Breach of Contract Claim

18 To state a claim for breach of contract, a plaintiff must allege that a contract imposed a
19 duty, the duty was breached, and the breach proximately caused the plaintiff harm. *Nw. Mfrs. v.*
20 *Dep’t of Labor*, 899 P.2d 6, 7 (Wash. 1995). While McClellon asserts that Capital One “breached
21 the contract,” he does provide any specific information regarding the relevant contract or the
22 provisions at issue. (Dkt. No. 11 at 1.) Even assuming the parties had a contract governing
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25 ⁵ The amended complaint asserts that Capital One’s advertising regarding its “zero-
26 liability” fraud protection is misleading. (Dkt. No. 11 at 4.) That claim is conclusory, in that it
fails to explain how Capital One’s advertising was misleading or had the potential to deceive a
substantial portion of the public.

1 McClellon's checking account, McClellon has failed to allege how Capital One breached a duty
2 under the contract. While the court can liberally construe McClellon's amended complaint, it
3 cannot supply an essential fact that he failed to plead. *See Pena v. Gardner*, 976 F.2d 469, 471
4 (9th Cir. 1992).

5 Therefore, McClellon's breach of contract claim is DISMISSED with prejudice and
6 without leave to amend. The Court concludes that further amendment would be futile because
7 Plaintiff has failed to correct the deficiencies in his complaint and has provided nothing in his
8 amended to complaint to suggest that he will do so in the future. *See Cervantes*, 656 F.3d at
9 1041.

10 5. Negligence Claim

11 The required elements for a negligence claim are: (1) duty; (2) breach of that duty; (3)
12 causation; and (4) damages. *Schooley v. Pinch's Deli Mkt., Inc.*, 912 P.2d 1044, 1046 (Wash. Ct.
13 App. 1996). Although the amended complaint states that Capital One "committed the tort of
14 negligence in handling [his] funds," it is not clear what duty Capital One owed McClellon or
15 how that duty was breached. (Dkt. No. 11 at 1.) The Court can construe the amended complaint
16 as alleging that Capital One owed a duty to McClellon to correct the reported transfer error
17 pursuant to Regulation E; however, as the Court has already explained, McClellon's Regulation
18 E claim is factually deficient. *See supra* Part II.B.1. As with his Regulation E claim, McClellon
19 has not plausibly alleged a negligence claim.

20 For those reasons, the Court DISMISSES McClellon's negligence claim without
21 prejudice and with leave to amend. Dismissal without prejudice is appropriate because
22 McClellon could potentially cure his claim by alleging additional facts demonstrating that
23 Capital One owed him a duty, breached that duty, and thereby caused him harm.

24 **III. CONCLUSION**

25 For the foregoing reasons, Defendant's motion to dismiss (Dkt. No. 12) is GRANTED.
26 The Court ORDERS as follows:

1 1. Plaintiff's claims under the EFTA and Regulation E and for common law
2 negligence are DISMISSED without prejudice and with leave to amend. If Plaintiff chooses to
3 file an amended complaint, he must do so within 14 days from the issuance of this order.

4 2. Plaintiff's claims pursuant to the UCC and CPA, as well as for breach of contract,
5 are DISMISSED with prejudice and without leave to amend.

6 3. The Clerk is DIRECTED to send a copy of this order to Plaintiff.

7 DATED this 22nd day of October 2018.

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A handwritten signature in black ink, reading "John C. Coughenour", is written over a horizontal line.

John C. Coughenour
UNITED STATES DISTRICT JUDGE